

ORIGINAL

Of Counsel:
KAWAMURA LAW OFFICE
Attorneys at Law

ROBERT D. KAWAMURA 4537-0
107 Lawyers Building
550 Halekauwila Street
Honolulu, Hawai'i 96813
Telephone: (808) 523-3777
Facsimile: (808) 523-3780
Email: honolaw@aol.com

FILED IN THE
UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

MAR 10 2006

at 3 o'clock and 20 min. M
SUE BEITIA, CLERK

Attorney for Plaintiff
JULIA M. BACKMAN, individually and on
Behalf of the ESTATE OF DANIEL VERNON BACKMAN,
Deceased, and as Next Friend to KELLY KEIKO
VALENE BACKMAN and JODI LEIGH YACHIYO BACKMAN,
Minors

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

JULIA M. BACKMAN,) Civil No. 04-00348 (HG KSC)
individually and on Behalf of) (Contract)
the ESTATE OF DANIEL VERNON)
BACKMAN, and as Next Friend to) **PLAINTIFFS' CONCISE STATEMENT**
KELLY KEIKO VALENE BACKMAN and) **OF FACTS**
JODI LEIGH YACHIYO BACKMAN,)
Minors,)

Plaintiffs,)

vs.)

RSKCO SERVICES, INC., a)
Illinois corporation; JOHN)
DOES 1-10; JANE DOES 1-10; DOE)
PARTNERSHIPS 1-10; DOE)
CORPORATIONS 1-10; DOE LIMITED)
LIABILITY ENTITIES 1-10; DOE)
"NON-PROFIT" CORPORATIONS 1-)
10; and DOE GOVERNMENTAL)
ENTITIES 1-10,)

Defendants.)

Hearing:

Date: March 29, 2006

Time: 9:30 a.m.

Judge: Kevin S.C. Chang

PLAINTIFFS' CONCISE STATEMENT OF FACTS

Pursuant to Rule 56.1 of the Local Rules of Practice for the United States District Court for the District of Hawaii, Plaintiffs JULIA M. BACKMAN, individually and on Behalf of the ESTATE OF DANIEL VERNON BACKMAN, Deceased, and as Next Friend to KELLY KEIKO VALENE BACKMAN and JODI LEIGH YACHIYO BACKMAN, Minors, by and through their attorney, Robert D. Kawamura, hereby submit their Concise Statement of Facts in support of its Memorandum in Opposition to Defendant RSKCO Services, Inc.'s Motion for Summary Judgment filed February 15, 2006.

<u>Facts</u>	<u>Evidentiary Support</u>
1. Daniel Backman, was husband and father of two minor daughters.	See ¶ 1, P 2, Findings of Fact, Dept. of Labor, 10-29-01, Ex "1".
2. On 7-41-97, Mr. Backman suffered a work related injury while working for his employer First Insurance Company of Hawaii, Ltd.	See ¶ 1, P 1, E-1
3. RSKCO is the adjustment company for the worker's compensation carrier.	See ¶ 1, E-1; P 1, E-2
4. In 3/99 Mr. Backman underwent a cervical fusion at C4-5 related to his work injury.	See ¶ 3, P 2, E-1
5. The 4-5-99 x-rays showed suspected complete incorporation of bone plug, separation and may have migrated slightly cranially.	See ¶ 4, P 2; ¶ 4, P 2, E-1; Also see Ex. "6"
6. The 7-12-99 x-rays showed a 4 mm	See ¶ 5, P 2, E-1

- | | |
|--|---|
| <p>protrusion of bone density at the C4-5 level.</p> | <p>Also see Ex. "7"</p> |
| <p>7. During 10-99, Mr. Backman began to treat with psychiatrist Dennis B. Lind, M.D. for anxiety and depression and then in 11-00 he began treating with Dean Otaka, M.D.</p> | <p>See ¶ 4, P 2, E-2</p> |
| <p>8. Dr. Otaka treated Mr. Backman's chronic pain with medication therapy.</p> | <p>See ¶ 5, P 2;
¶ 7, P 5, E-2</p> |
| <p>9. Mr. Backman had chronic pain problems.</p> | <p>See ¶ 4, P 4;
¶ 7, P 5, E-2.</p> |
| <p>10. Mr. Backman's use of prescription "skyrocketed" in 2001.</p> | <p>See ¶ 2, P 4, E-2</p> |
| <p>11. Mr. Backman developed a prescription narcotic dependency and also developed pancreatitis attributable to the adverse effects from his medications.</p> | <p>See ¶ 5, P 2;
¶ 7, P 5, E-2</p> |
| <p>12. RSKCO paid for the treatment of Mr. Backman's chronic pain and pancreatitis.</p> | <p>See ¶ 5, P 2, E-2</p> |
| <p>13. On 1-16-01, Jon Graham, M.D. requested surgery for Mr. Backman.</p> | <p>See ¶ 1, P 2, E-1</p> |
| <p>14. Mr. Backman decided to undergo the surgery because he hoped that it would relieve his chronic pain and allow him to discontinue taking his pain medications.</p> | <p>See ¶ 6, P 2, E-2</p> |
| <p>15. Defendant failed to deny the January 16, 2001 request within the seven day period required time under Hawaii worker's compensation law.</p> | <p>See ¶ 1, P 2, E-1</p> |
| <p>16. Defendant hired Dr. Diamond to to perform an independent medical evaluation on the need for surgery.</p> | <p>See ¶ 1, P 3, E-1</p> |
| <p>17. Defendant did not send the 4/99 & 7/99 x-rays showing problems with the</p> | <p>See ¶ 5, P 2;
¶ 6, P 3, E-1</p> |

the 3/99 fusion to Dr. Diamond or to Dr. Holmes.

18. Based on the incomplete records, Dr. Diamond was not able to answer RSKCO's questions. See ¶ 5, P 2; ¶ 1, P 3, E-1
19. Dr. Diamond suggested an independent reading of the 12-15-00 MRI. See ¶ 3, P 3, E-1
20. RSKCO hired Dr. Holmes to review the 12-15-00 MRI on the need for surgery. See ¶¶ 2- 6, P 3, E-1
21. Based on the incomplete records, Dr. Holmes did not review any x-rays. See ¶ 6, P 2, E-1
22. Dr. Holmes reviewed the 12-15-00 MRI who opined that the MRI was of "marginal quality". See ¶ 6, P 3, E-1
23. On October 24, 2000, Dr. Graham noted in his report that "The April films show evidence of partial collapse and ventral protrusion of the graft." See Ex. "5"
24. On 6-22-01, RSKCO denied the surgery request based on Dr. Holmes' reading of MRI, Dr. Yuh's reading, and Dr. Diamond's Report. See ¶ 2, P 3, E-1
25. Mr. Backman received a non-postmarked Denial dated 6-22-01. See ¶ 2, P 3, E-1
26. RSKCO had no explanation as to why the the denial letter envelope had no postmark stamp on it. See ¶ 1, P 3, E-1
27. RSKCO therefore denied liability for the surgery and sent Mr. Backman notice of its intent to terminate his total disability benefits. See ¶ 3, P 3, E-1
28. Because the denial letter did not have any postmark on it, there was no basis as to when it was See ¶ 2, P 2, E-1

sent to Mr. Backman. When he received the letter he was not in a competent mental state to review the denial. He did retain an attorney and gave the letter to the attorney.

29. The Director determined that the surgery request was reasonably needed medical care. See ¶ 6, P 3, E-1
30. The Director found RSKCO liable for the surgery and ongoing medical care. See ¶ 6, P 3, E-1
31. The Director found that Dr. Diamond was not able to formulate an opinion because of the different MRI findings of Dr. Yuh and Dr. Graham. See ¶ 6, P 3, E-1
32. The Director found that Dr. Holmes opinion was based on a reading of the MRI which was of marginal quality and he did not have the prior x-rays or MRI films to review and consider in drafting his 6-6-01 report. See ¶ 6, P 3, E-1
33. Dr. Graham reviewed the 3/99, 4/99 and 7/99 x-rays and 1/99 and 12/99 and 12/00 MRIs and that Dr. Graham noted C4-5 lateral stenosis of both lateral recesses, left greater than right due to residual osteophytes. See ¶ 7, P 3, E-1
34. Dr. Graham indicted that Mr. Backman had not improved with conservative therapy and that his MRI remained unchanged and that Mr. Backman continued to have increasing neck and left arm pain which could be helped by surgery. See ¶ 1, P 4, E-1
35. On 1-23-01, Dr. Graham wrote to RSKCO's attorney and advised that Mr. Backman had not improved with conservative therapy and as expected his MRI remained unchanged and he See Ex. "4"

continued to have increasing neck and left arm pain which could be helped by surgery at the C4-5 level.

36. Dr. Graham noted in his 5-1-01 report that the proposed surgery would have a 50-60% chance of benefiting Mr. Backman and the 1999 and 2000 MRIs already showed abnormal stenosis at C4-5. See ¶ 2, P 4, E-1
37. In his 5-1-01 letter, Dr. Graham reports his concern that continued delays may not only undermine any gains to be obtained by surgery. See Ex. "3"
38. The Director found that RSKCO was Liable for Mr. Backman's ongoing medical care to include the surgery, open-ended temporary total disability benefits. See ¶ 4, P 4, E-1
39. In preparing for the surgery Dr. Otaka began to wean Mr. Backman from his narcotic medications. See ¶ 3, P 2, E-2
40. On 11-20-2001, Dr. Otaka noted that Mr. Backman was upbeat due to the Good news concerning the surgery. See ¶ 6, P 2, E-2
41. Mr. Backman's friend Tiyaana Fernandez spoke to Mr. Backman in December of 2001 and he appeared relieved and happy that he finally got the surgery approval and his spirits were good and he did not appear to be depressed or sad. See ¶ 6, P 2, E-2
42. Dr. Otaka's 4-14-2002 letter verified that Mr. Backman was positive and focused on how life would drastically change for the better after his surgery and he was extremely compliant with his being weaned from his narcotic addiction. See ¶ 1, P 3, E-2
43. On January 2, 2002, Mr. Backman died See ¶ 3, P 1;

- accidentally from the toxic effects of his pain medications. ¶ 7, P 5, E-2
44. Mr. Backman's death was not caused by his willful intention to injure himself or another by intoxication. See ¶ 3, P 1, E-2
45. The autopsy report concluded that the cause of death was accidental poisoning from the toxic effects of his medication. See ¶ 3, P 2, E-2
46. Mr. Backman left a wife and two minor daughters who are his dependents entitled to compensation under Section 386-41, 386-42 and 386-43 HRS. See ¶ 3, P 1 -
¶ 1, P 2, E-2
47. RSKCO hired Jon Streltzer, M.D. as it claimed that Mr. Backman's death was a result of narcotic dependence and that Mr. Backman was not compliant with his medications. See ¶ 8, P 3, E-2
48. Mr. Backman's death was comensable. See ¶ 7, P 5, E-2
49. The Director found a causal Relationship between the initial Injury and Mr. Backman's demise from The toxic effects of his prescription pain medication had been demonstrated. See ¶ 7, P 5, E-2

Dated: Honolulu, Hawai'i, March 10, 2006.


ROBERT D. KAWAMURA

Attorney for Plaintiffs
JULIA M. BACKMAN,
individually and on Behalf of
the ESTATE OF DANIEL VERNON
BACKMAN, deceased, and as
Next Friend to KELLY KEIKO
VALENE BACKMAN and JODI LEIGH
YACHIYO BACKMAN, Minors